IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 56 OF 2005

Mr. Aatif Nasir Mulla]
a Muslim, Indian Inhabitant]
aged 28 years, Occu : Service]
Resident of House No.]
Borivali, Post Padga,]..Appellant
District Thane (Presently in](Ori.Accused
Judicial Custody (at Thane Jail)] No.2)

versus

The State of Maharastra]
Through the DCB, CID, Police]..Respondent
Head Quarters, Crawford Market,](Original
Mumbai 400 001] Complainant

Mr. R. M. Agrawal with Mr. M. H. Solkar for the Appellant - Original Accused No.2.

Mr. S. R. Borulkar, P.P, Mrs. P. H. Kantharia, APP and Mr. D. S. Mhaispurkar, APP for the Respondents - State.

CORAM : D. G. DESHPANDE, &
V. M. KANADE, JJ.

DATE : 19TH DECEMBER,2005

ORAL JUDGMENT :

1. Heard learned counsel for the appellant - original accused no.2 and learned P.P. for the State.

2. Appellant - Accused is one of the accused in

POTA Special Case No. 2 of 2003 pending before the Special Court, Mumbai. He filed an application for bail No. 2 of 2004. There were two other Misc. Applications. All of them were heard and decided by the Special Court on 15.12.2004 and the application were rejected. Therefore, this Appeal under the provisions of The Prevention of Terrorism Act, 2002 (hereinafter referred to as "POTA Act").

3. The charge against the accused along with others, is that there was a criminal conspiracy to cause bomb blast, which, in fact, occurred at Mulund, Vile Parle and Mumbai Central pursuant to the conspiracy. According to Mr. Agarwal, the only evidence against the accused that is collected by the prosecution is confessional statement of the co-accused and recovery of AK-56. Mr. Agarwal contended that the provisions of bail in offence under POTA have been diluted by the Supreme Court in different judgments, which he relied upon. Secondly, he also contended that the Supreme Court has now clearly laid down that the confessional statement of one accused cannot be used against other, and, therefore, that piece of evidence, heavily relied upon by the prosecution, cannot be

used, at all, against the accused.

4. According to Mr. Agarwal the recovery of AK-56 at the instance of the accused has occurred much after three bomb blasts took place in Mumbai. There is no evidence of the use of the said weapon and nothing to show that the accused was the person who owned the said rifle. Mere knowledge of keeping the AK rifle at a particular place, cannot at all be taken and shown as involvement of the accused in the conspiracy. Mr. Agarwal also contended that accused is a Graduate in Political Science. He has done his M.BA. from Pune University. He was employed in a well known company. He hails from a respectable family, and, therefore, considering all the circumstances, he was entitled for bail.

5. On the other hand the learned PP contended that the offence against the accused and the others, are very serious. Three bomb blasts that took place at the above three places were in the nature of revenge and it was conspiracy to wage war against the Government. Scores of people died and many were injured in three bomb blasts and looking to the entire nature of conspiracy, the accused did not

deserve the bail, at all. According to the learned P.P. the accused has also taken part for training to Terrorists for use of AK 56. The recovery of AK 56 at the instance of the accused, was a very strong circumstance showing his involvement. As regards the confession of the co-accused against the appellant - accused, the learned P.P. contended in the circumstances and looking to the nature of the offence, the same was required to be taken into consideration. He therefore contended that there were no reasons to interfere with the order of the Special Judge. He also drew our attention to the affidavit of Nagesh Shivdas Lohar, Sr. Inspector of Police D.C.B. C.I.D. Crime Branch, filed in this Criminal Appeal No. 56 of 2005 opposing the prayer for bail of the appellant - accused.

6. So far as confessional statement is concerned, it was a statement of one Anwar Ali Javed Ali Khan and Goolam Akbar Khotal. As per that statement, the present appellant - accused had arranged shelter at Pune for the Slain Pakistani Terrorist Faizalkhan and had attended meeting with him along with another accused Saquib Nachan and others, and, this clearly shows the association of

the accused with other terrorists.

7. Firstly, Mr. Agarwal, drew our attention to the provisions of Section 49 sub sections (6), (7), (8) and (9), and, relied upon the Judgment of the Supreme Court reported in **AIR 2004 Supreme Court 456 People's Union for Civil Liberties vs. Union of India.** Our attention, in particular, was drawn to paragraph 67. The Supreme Court held that provisions of Section 49(7) have been added by way of exception and it means that after the expiry of one year after the detention of the accused for offences under POTA, the accused can be released on bail after hearing the Public Prosecutor under ordinary law without applying the rigour of Section 49(7) of POTA. It also means that the accused can approach the court for bail subject to conditions of Section 49(7) of POTA within a period of one year after the detention for offences under POTA. Then in paragraph 68, the Supreme Court has observed as under:

> **"Proviso to Section 49(7) provides that the condition enumerated in sub-section (6) will apply after the expiry of one year. There appears to be an accidental omission or mistake of not including the word 'not' after the word 'shall' and before the word**

> **'apply'. Unless such a word is included, the provision will lead to an absurdity or become meaningless. Even otherwise, read appropriately, the meaning of the proviso to Section 49(7) is that an accused can resort to ordinary bail procedure under the Code after that period of one year. At the same time, proviso does not prevent such an accused to approach the Court for bail in accordance with the provisions of POTA under Section 49(6) and (7) thereof. This interpretation is not disputed by the learned Attorney General."**

Mr. Agarwal therefore contended that the accused is in custody as of now for nearly three years, and when he applied to the Special Court the period was more than one year, and, now, therefore, rigour of Section 49 could not come in the way of the appellant - accused in applying for bail, and, for the court in granting bail. He, therefore, contended that the ordinary procedure for bail has to be followed when the application is made in such circumstances i.e. after one year of detention. Learned P.P. could not show us anything in this regard nor could he show that the Supreme Court has taken any other view after the aforesaid judgment. It is therefore clear that the bail application ought to have been treated by the Special Court as an ordinary bail application or bail application where ordinary bail procedure, was applicable.

8. Mr. Agarwal also relied upon a judgment of the Supreme Court reported in **2005 AIR SCW 2215 Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and another.** It was the judgment under Maharashtra Control of Organised Crime Act (30 of 1999) where the provision similar to that of Section 9 of POTA Act was there regarding bail i.e. requirement of positive finding that the accused - appellant has not committed offence under the Act. While dealing with this aspect, the Supreme Court in paragraphs 46 and 49 held that presumption of innocence is a human right. Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Sub Section (4) of Section 21 of MCOCA must be interpreted keeping in view the aforesaid salutory principles. Giving an opportunity to the public prosecutor to oppose an application for release of an accused appears to be reasonable restriction but Clause (b) of sub-section (4) of Section 21 must be given a proper meaning. That sub section (b) of Section 21 is as under:

> **"Where the Public Prosecutor opposes the application, the Court is satisfied that**

> **there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."**

Then in paragraph 47 the court raised a question **"Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the Court to record such a finding? Would there be any machinery available to the Court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?** Then in paragraph 49, the Supreme Court observed that: **"We are further more of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed."**

9. Mr. Agarwal also relied upon the judgment of the Supreme Court reported in **[2005 (30) AIC 18 (S.C.)] Vasanthi and State of A.P.** That was a case under Andhra Pradesh Control of Organised Crimes Act, 2001. The appellant who was a lady was

arrested on 21.2.2004 under Section 120B read with certain other provisions of I.P.C. and also under Section 3 sub Section (4) of The Andhra Pradesh Control of Organised Crimes Act. She applied for bail before the Sessions Court, that was rejected. In the High Court also the bail application was rejected on the ground **"it is not reasonably possible to conclude at this stage there are no reasonable grounds for believing that she is not guilty of the offence and that she is not likely to commit any offence while on bail."** Thereafter the Appellant moved the Supreme Court. The Supreme Court while deciding the appeal or application taken into consideration its judgment in Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and another and relied upon paragraph 49 of the said judgment, which we have reproduced in our judgment, as above. There again after referring to paragraph 55 of Ranjitsing Brahmajeetsing Sharma's judgment the Supreme court held that Section 21(4) does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act, and, as regards the second requirement it was laid down in Ranjitsing Sharma's case. The case of Ranjeetsing

Sharma was extensively referred by the Supreme Court and relied upon, and, ultimately bail was granted to the appellant - lady.

10. Mr. Agarwal therefore contended that these three judgments relied upon by him, have diluted the rigour of the provisions of POTA, which are similar to those Acts which were referred to by the Supreme Court in their judgments, and, therefore now only thing is to be seen is whether there is any material for further detention of the accused by refusing his bail application, as has been done by the Special Court.

11. Regarding facts Mr. Agarwal contended that the evidence of confessional statement of the co accused, cannot be used against this accused, and, for that purpose, Mr. Agarwal pointed out the charge sheet in respect of three bomb blast cases which has been filed, but the accused along with all others have been discharged.

12. So far as it related to Bomb Blast cases at Ghatkopar and in this regard i.e. about use of confessional statement of one accused against the

other, Mr. Agarwal, relied upon the judgment of the Supreme Court reported in 2005 AIR SCW 4148 wherein the Supreme Court considered the aspect of use of confession under POTA against co accused, and then the Supreme Court concluded that confession of one accused cannot be used against the other accused under the provisions of POTA. Mr. Agarwal, therefore, contended that the attempt of the prosecution to harp upon the confessional statement of the co-accused has to be frustrated in view of this judgment of the Supreme Court. The ratio of the Supreme Court directly applies to the facts of the case, and, therefore, that piece of evidence so far as it relates to prayer for bail or that circumstance of a confessional statement of co accused cannot be taken into consideration, that has to be disregarded completely.

13. Regarding the role of this accused in the conspiracy, learned PP tried to contend as per the prosecution case that the accused is alleged to have given training to the other terrorists for the use of AK 56. Mr. Agarwal contended that not a single statement of any of the witnesses named in the charge sheet states so. Learned PP could not point

out that those who were allegedly trained in the camps held for that purpose have ever stated or anywhere stated that it was this accused who gave them training. Accused was never seen at those camps either by simply remaining present in the camps or for giving training to those persons. Therefore, that submission of the learned PP, is, required to be rejected. Thereafter, the learned PP contended that the accused had given shelter to a terrorists i.e. Pakistani National. Our attention was drawn by the learned PP which is a part of statement of accused Gulam Akbar Abdul Sattar Khotal, he is co-accused. Name of the present applicant - accused is Aatif Nasir Mulla. Now this co-accused Gulam states (on page 84 of the appeal book) that on one day Asif Mulla brought Atif - the present accused to his house and said that the meeting was arranged between Atif (present appellant) and Irfan. (Irfan is a Pakistani National). Then about this meeting Asif told to Sakib Nachin and Asif Mulla where to meet and the answer was we will meet at the same place where the meeting was there on the earlier day i.e. near the sugar-cane centre. Thereafter the accused Gulam who was giving statement, and Asif went to the house of

sister of Gulam to see the match. One and half hours thereafter Gulam went back to his house and learnt that the present appellant - accused had come to his house and had gone to offer Namaz. Therefore, Gulam and Asif Mulla went to Masjid but they did not see Atif - the present applicant - accused and then Gulam saw after the Namaz that Asif Mulla and Aatif were going on bicycle.

14. Then the learned PP drew our attention to the confessional statement of Anwar Ali - the co-accused. Our attention in this regard was invited to pages 55, 56 and 57, certain portions thereof are as under:

> **"After few days in the month of Nov. 2002 as Holy month Ramazan was going on, one day Squib sent Atif Mulla to Pune with a chit which had a short message of making residential arrangements at my fathers flat situated at Kondwa Budruk Pune 48. My father Javed Ali Mumtaz Ali Khan purchased these flats after selling his agricultural plot at Sirur, Dkist : Pune. Flat No. 3 and 4 of 400 sq. ft. each on first floor were purchased from Abu Kalandar Sofi on agreement for Sale Basis by making part payment. It was nto a registered deed. By the time deed was over Abu Kalandar Sofi expired. My parents used to stay there till March 2002. Due to succession and other family problems of Sofi family transfer of title could not take place. And in March 2002 my father also expired. After his**

death my mother shifted to my house at 1103, Old Modikhana, Pune 1. Since then my father's flat was vacant. Saquib knew this and he asked for the keys to be handed over to Atif Nasir Mullah.

Atif Nasir Mulla is known to me since 1987-88, when I visited Padga in one of SIMI's program they had invited us for a lunch. He was every young that time. Then he took admission for MBA in Pune few years back. I happened to meet him occasionally and accidentally in Pune during his MBA course.

After taking keys of my father's flat (Flat No.3) of Kondwa Budruk, Atif Mullah went to his sister's house which is in Pune and stayed in the night there. Next day Atif Mullah received a Pakistani person called Karim alias Irfan Karim alias Faisal from station and made him stay at flat No.3, of my father. Atif gave me his own mobile No. and house telephone No. which I don't remember now and left for Padga asking me to visit and help Karim alias Irfan Karim alias Faisal in arranging his food. He continued to stay there, I met him there 3 to 4 times, after talking to him, I realized that he is a Pakistani by Nationality, by his way of talking and his lack of knowledge the Geographical topography of Mumbai, Mahahrashtra and India. Later on Saquib Nachan himself confirmed this fact to me by saying that he is an important person affiliated to Laksar-e-Toiyeba. I on my visit to him asked about his period of stay at Pune because I was told that he is going to stay for a week only. He replied Atif's mobile is off and I am not able to contact him. He also said I do not have Saquib's Telephone No. I then contacted Atif Mulla at his residence number and called him to Pune for shifting Pakistani Karim alias Irfan Karim alias Faisal. Then Atif Mulla came to Pune and went alone to meet him without my knowledge. I was busy those days in completing my Ph.D. thesis work. It was December 2002. After meeting him Atif Mulla

came to my residence I told him to shift him in any case as early as possible. Pakistani Karim alias Irfan Karim wanted to roam around Pune city. Since I was busy in my submission of thesis I introduced him to Sadique (Khopoli) to be his local guide. As and when Sadique got time he accompanied him.

Atif Mulla replied that I will communicate this to Saquib Nachan. Around 10th of Jan. 2003 Atif Mullah and Saquib Nachan came to Pune in a white Maruti Zen. Atif dropped Saquib Nachan at my residence at 1103, Old Modikhana Pune 1, and he left for his sister's place. I and Saquib sat for say half an hour there. Saquib met my mother there and thereafter we left to a restaurant to buy our Lunch. On the way, I told Saquib Nachan to shift Pakistani Irfan Karim alias Faisal immediately from Pune. He agreed to it. We got the lunch packed from restaurant then we called Atif to the restaurant, from there we all went to Kodnwa flat. We had Lunch with this Pakistani Irfan Karim alias Faisal. Atif Mulla left the place right after lunch. After finishing lunch myself, Saaquib and Pakistan Irfan Karim Ali Faisal discussed (there in the same flat No.3, of Kondwa Budruk, Pune 48) to assassinate Hindu leaders like Praveen Togadia and others and to carry out series of Bomb blasts at different places in Mumbai in order to create terror and rift between the two communities which will result into communal riots and disharmony."

From the aforesaid portion of the Statement of the co-accused Anwar Ali, the learned PP contended that this evidence was sufficient, at this juncture to show that the appellant - accused had given shelter to a Pakistani terrorists and they had a meeting in furtherance of the conspiracy. Mr. Agarwal,

therefore, on the other hand contended that no such inference can be drawn from the aforesaid part of the confessional statement of Anwar Ali. There is nothing to show that the present appellant - accused was knowing about the activities of Pakistani National Irfan and that Irfan was implementing a conspiracy, the house to which Irfan was to be taken was the house of appellant - accused. Therefore, if without knowing the antecedents of Irfran the appellant - accused had taken him at Pune, it cannot be said that he has given a shelter to a terrorist. He further pointed out that even if the statement of Anwar Ali is taken as it is, as reproduced above, the meeting between the accused took place after the appellant -accused left i.e. after taking lunch in the restaurant. Mr. Anwar Ali has clearly said **"Atif Mulla left the place after lunch.. and then meeting or discussions took pace to assassinate Hindu Leaders."**

15. We find considerable force in the submissions of Mr. Agarwal. From the statement of Anwar Ali, relied upon by the learned Prosecutors, and, as reproduced above, it is clear that the appellant - accused had no knowledge about the

conspiracy, had no knowledge about the antecedents and activities of Irfan, and, he was never a party to the same.

16. Mr. Agarwal further contended that in order to show that the appellant - accused was a part of conspiracy, it was incumbent upon the prosecution, even, at this stage, to show as to the role played by the accused. Merely saying that it was a part of conspiracy, cannot come in the way of the accused, who claims release on bail, and according to Mr. Agarwal, there is no overt act attributed to the present accused in this conspiracy.

17. Our attention, in this regard, was invited by Mr. Agarwal to the aforesaid judgment of the Supreme Court reported in 2005 AIR SCW 4148 wherein in paragraph 12 of the judgment the entire aspect of conspiracy has been considered by the Supreme Court with reference to important leading cases on this point, and, also after distinguishing the judgment of the Supreme Court in Firozuddin Basheeruddin vs. State of Kerala (2001(7) SCC 596), the Supreme Court observed as under:

> **"We do not think that the theory of agency can be extended thus far, that is to say, to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others. We are of the view that those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy; but the non-participant conspirators cannot be found guilty of the offence or offences committed by the other conspirators. There is hardly any scope for the application of the principle of agency in order to find the conspirators guilty of a substantive offence not committed by them. Criminal offences and punishments therefor are governed by statute. The offender will be liable only if he comes within the plain terms of the penal statute. Criminal liability for an offence cannot be fastened by way of analogy or by extension of a common law principle.**

In the background of this judgment of the Supreme Court, Mr. Agarwal contended that so far as the present appellant - accused is concerned, not a single overt act is attributed to him, he has not taken any part anywhere in the bomb blast. He was not knowing any part of the conspiracy, he has not given any training to terrorists for use of any weapon, he has not given shelter to the Pakistani terrorists. After knowledge of his antecedents as terrorists, he was not present in the meeting in which the conspiracy was discussed or concluded,

and, looking to his period of detention, which is nearly three years, his educational qualifications etc., he was required to be released on bail.

18. Learned Prosecutors drew our attention to Section 10 of The Indian Evidence Act, we are reproducing the same:

> **"Things said or done by conspirator in reference to common design.-** Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

He also relied upon illustration given in this Section and contended that Section 10 makes the conspiracy very wide and makes everything said or done as relevant. Therefore, according to him, if a person was given a shelter by this accused and it was found that he was a Pakistani National and Terrorist, then giving shelter would also be relevant and part of conspiracy. Further, according

to him, all the allegations against the present appellant - accused are covered by Section 10 and therefore this is a case where prayer for bail is required to be rejected and appeal is required to be dismissed.

19. Mr. Agarwal relied upon the aforesaid judgment of State (N.C.T. Delhi) vs. Navjot Sandhu (2005 AIR SCW 4148 and drew our attention to paragraph 20 of the said judgment and also contended on the basis of the aforesaid judgment that Section 10 is a rule of relevancy of evidence. The Supreme Court in paragraph 11 of this judgment has considered Section 10 of the Evidence Act and referred to the judgment of the Privy Council in Mirza Akbar vs. King Emperor (AIR 1940 PC 176), wherein it was held that **"the thing done, written or spoken in the course of carrying out the conspiracy "was receivable as a step in the proof of the conspiracy".** What is tried to be achieved by the learned PP by relying upon Section 10 of the Evidence Act was also tried to be done by Mr. Gopal Subramanium on the interpretation of Section 10, but while deciding the aspect of agency in a conspiracy, the Supreme Court rejected the similar contention,

without hesitation.

20. The only thing thereafter remains against the present accused is a recovery of AK 56. The learned PP drew our attention to Section 4 of POTA in this regard. This section provides that unauthorised possession of arms is punishable and the punishment may extend to imprisonment of life or with fine which may extend to Rs.10 lacs or with both. Therefore, the learned P.P. contended that AK 56 is recovered at the instance of the appellant - accused and when the punishment is life imprisonment, he is not entitled for bail. Learned PP drew our attention to the affidavit of Senior P.I. Nagesh Shivdas Lohar, and, stated that on 3.5.2003 one AK 56 rifle loaded with magazine containing 28 live cartridges and one empty magazine and two empties of AK 56 cartridges was also recovered. He also pointed out that in the CA report this AK 56 is mentioned as Exhibit 6 and there is evidence to show that it was used in the commission of subsequent crimes. Mr. Agarwal, drew our attention to Exhibit ’B’ of this appeal, which is panchnama of the recovery of AK 56. This panchanama is at record page 39 of the memo of

appeal. It is in Marathi. As per this panchnama the present accused led the raiding party or the police party with the panchas to the compound of saw mill. When the party reached the saw mill, one Manager Abdul Khalid came there, he disclosed that the saw mill is owned by the father of the present accused. The area of the saw mill was 2 acres. There was a wall around the saw mill. The accused is alleged to have led the police party to a small room which was touching the southern compound wall, number of wooden logs were kept there near the wall. The accused got the key of the small room from the Manager and then took out this rifle AK 56. Mr. Agarwal, therefore, contended that firstly there is no evidence, at this stage, that this rifle AK 56 was used at any time. Secondly, saw mill was situate on a huge area with number of structures, wooden logs, hundreds of businessmen often go to the saw mill for bringing wood for cutting, then trucks for loading and unloading frequent to saw mill, and, therefore considering these facts, the evidence or recovery, cannot be said to be sufficient to connect the accused with the conspiracy. Mr. Agarwal led emphasis on the fact that there is no evidence of the accused giving training to the terrorists for

use of AK 56. Therefore, according to him, even if the case of the prosecution is accepted that the said AK 56 was recovered at the instance of the accused that was not sufficient circumstance to detain the accused in custody any more, who is in custody for nearly three years.

21. According to Mr. Agarwal, this recovery of AK 56 on 3.5.2003 is dubious and suspicious. He pointed out that the accused was arrested on 15.4.2003, police custody was granted to him till 28.4.2003. In that prayer for police custody remand, nothing is mentioned that any weapon is to be recovered from the accused. Then on 28.4.2003 police custody was granted till 12.5.2003 but there also nothing is mentioned about recovery of weapon at the instance of the accused, and, therefore, Mr. Agarwal contended that if at all police had to recover any weapon from the accused, they would have definitely mentioned the fact in the remand papers. He also contended that during this entire period, no statement of the accused came to be recorded, and, if that is so, there was no reason for accused to make any statement subsequent leading to recovery of AK 56.

22. Secondly, Mr. Agarwal drew our attention to news item published in Mid day, newspaper published at Bombay in its issue dated 3.5.2003. As its name suggests it is a news paper for Mid Day that news paper's cutting is in the record, about which there is no dispute. The actual news paper cutting and its English verbatim transcript is also filed side by side at pages 66 and 67 respectively, of the compilation. Following portion is material :

> *"Latest Padgha Weapons find links SIMI to LeT*
>
> *Cops say they will recover more as Nachan talks.*
>
> *The Mumbai police on Wednesday seized a cache of arms including two AK-56 rifles and two imported pistols, from a hide out near Bodvali village in Padgha near Bhiwandi.*
>
> *This is the second arms haul from the area in a week*
>
> *Earlier police has sized an AK-56 rifle from Padgha".*

Mr. Agarwal contended that first AK 56 was recovered by the Police on 19.4.2003 from original accused No.1, the second AK 56 was recovered on 2.5.2003 from Borivli and third AK 56 was allegedly recovered from the present accused on 3.5.2003. According to Mr. Agarwal, the third and the last

recovery of AK 56 was on 3.5.2003. As per the panchnama of third recovery of AK 56 is dated 3.5.2003. It is at about 5.20 a.m. Panchas were called in the Conference Hall of CID office at Crawford Market, Bombay. The accused was allegedly present there. From there the police went to Bhiwandi Nashik By-pass and from there they went to the saw mill. First panchnama about disclosure statement was concluded at 5.50 a.m. The second panchnama about recovery was completed and concluded at 9.30 a.m. The timings are mentioned in the panchnama. Mr. Agarwal, therefore, contended that Mid Day is a paper which is printed and published in Bombay, and, if the issue of 3.5.2003 about the recovery of rifle AK 56 at the instance of the accused appears, then recovery is not at all on 3.5.2003 as shown by the police because the newspaper says about the recovery of third AK 56 rifle, and, if panchnama about recovery of third AK 56 is concluded at 9.30 a.m. then the news could not have appeared in the issue of Mid Day on 3.5.2003, because printing of Mid Day would be completed and the paper would be out for marketing by 9.30 or 10 O'clock. Therefore, according to Mr. Agarwal, this is a strong suspicious circumstance

causing doubt about the recovery of AK 56 at the instance of the present appellant - accused.

23. The learned APP contended that the entire recovery of AK 56 cannot be doubted merely on the basis of a newspaper report. He said that nothing is there on record to show as to what was the source of information of the newspaper report because the news was published in the Mid Day and so far as the recovery is from the place, which was exclusively known to the accused.

24. Mr. Agarwal, alternatively contended, that even if it is accepted that AK 56 was recovered from the accused, he could not be held to be a part of the conspiracy because there is no overt act attributed to him, and, contended that accused cannot be held to be part of the conspiracy on the principle of agency, and, therefore, he was entitled for bail. On the other hand, learned Prosecutors contended that recovery of AK 56 at the instance of the accused, clearly show that he is liable to be punished for life sentence, and, therefore, he was not entitled for bail.

25. So far as the submission of Mr. Agarwal that there is no mention about any kind of recovery in both the remand papers is concerned, we do not find much force. Because, ultimately the disclosure has to be made by the accused voluntarily and therefore when and at what time the accused or the person arrested will make up his mind to make a disclosure, cannot be known to the police, in advance. Therefore, not mentioning of the fact of recovery or a wanted recovery in the remand papers, cannot come in the way of police or prosecution, at least, in this case. However, the newspaper report in Mid Day dated 3.5.2003 does create some doubt about recovery, though this is merely a prima facie finding, not binding on the trial court, in any manner, whatsoever.

26. However, as regards the submission of Mr. Agarwal that excepting the recovery of AK 56, the prosecution has no evidence to connect the accused with the crime, has to be accepted, at this stage. We have discussed the links putforth, before us, by the APP showing involvement of the accused in the conspiracy. They are not sufficient to hold that he was a member of conspiracy or he had a knowledge of

the conspiracy. Therefore, considering all the facts and circumstances, that is non involvement of the accused in the conspiracy, not attributing any overt act to the appellant - accused in the conspiracy, custodial period of the accused for about 33 months till the date, his educational qualifications and family ground, he is entitled for bail. Therefore, we pass the following order:

ORDER

. Appeal is allowed to the following extent only.

. Prayer for discharge not pressed, and hence not considered.

. Impugned order of the Special Judge (under POTA 2002 Shri A. P. Bhangale) dated 15.12.2004 rejecting bail application of the appellant - accused, is set aside.

. The appellant - accused be released on his P.R. bond of Rs.25,000/- (Rupees Twenty Five Thousand) with two solvent sureties in the like

amount.

. Appellant - accused to surrender his passport, if any, to the DCB CID.

. Appellant - accused to attend the office of DCB CID once in a week for six months. Thereafter, once in a month, till POTA Special Case No. 2 of 2003 is decided.

. Appeal disposed of accordingly.

(D.G. DESHPANDE, J.)

(V. M. KANADE, J.)